Supreme Court, U.S.
FILED
AUG 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-614

In The

Supreme Court of the United States

October Term, 1987

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC.,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

REPLY BRIEF

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ARGUMENT

LIKE ANY OTHER OBSCENITY PROSECUTION, THIS CASE MUST BE REVIEWED UNDER THE FIRST AMENDMENT STANDARDS WHICH GOVERN ANY REGULATION OF UNPROTECTED SPEECH.

For several years, Ronald Sappenfield and the corporate petitioners have owned two adult bookstores in Howard County, Indiana. There is no evidence which indicates that prior to the 29th day of October, 1984, any questions regarding the propriety of any material which was offered for sale had been raised. There is no evidence

which indicates that Sappenfield had received any complaints from his customers or that he was chargeable with knowledge that any of the materials which he offered for sale were thought to be outside of the contemporary community standards of Howard County. However, based upon the purchase of six similar magazines on three separate occasions, the State of Indiana wishes to treat Sappenfield like a "mobster" who has repeatedly performed acts of murder, drug dealing, loan sharking, or theft and send him to prison for over twenty years. Indiana wishes to set in motion a chain of events which will result in the closure of his stores and the termination of his business with all of its communicative attributes. It is against this background that Indiana and the various amici contend there is no First Amendment impact. Such a contention is patently frivolous.

Using obscenity as a predicate offense, the federal RICO statute and those of Indiana and other states represent the most harshly punitive *anti-obscenity* measures ever enacted.[1] Solely for two or more obscenity violations, even if committed in a single day in the course of operating a business "enterprise" such as a bookstore or

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[1] The range of penalties for obscenity/RICO violations varies widely. The federal statute 18 U.S.C. § 1961 (1984) and those of New Jersey, N.J. Rev. Stat. § 2C: 41-1 (West Supp. 1982); Pennsylvania, Pa. Stat. Ann. tit. 18, § 911; and Delaware, Del. Code Ann. tit. 11, § 1502 (1986) provide for up to twenty years imprisonment. Florida's statute, Fla. Stat. Ann. § 895.02 (West 1983), carries up to thirty years incarceration. Fines and forfeitures generally follow as a matter of course.

video outlet or newsstand, a defendant could be sentenced to many years in prison. Due to the combined effects of RICO's extreme sanctions and the underlying obscenity statute's vagueness and minimal scienter requirements, this statute creates an inestimable and impermissible chilling effect upon the entire genre of erotic materials.

Under the applicable First Amendment standards of review, the chilling effect of such a draconian statute can not be denied. Indiana concedes as much although Indiana would characterize the chilling effect as "deterrence." (Respondent's Brief p. 8; Brief of United States p. 13). Indiana therefore does not address the merits of Sappenfield's challenge to the criminal RICO statute on chilling effect grounds. Rather, it seeks refuge in the twin premises erroneously adopted by the Indiana Supreme Court in *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987), that such a statute enjoys the presumption of constitutionality, and that the RICO Act as applied to obscenity does not implicate First Amendment values. Both of these assumptions are incorrect under firmly entrenched constitutional principles.

The applicability of First Amendment standards of review to this case is beyond reasonable dispute. Because it is virtually impossible to predict in advance what will be deemed obscene, the practical effect of this statute is to create a regime of self-censorship under which a great deal of protected expression inevitably will be suppressed. This Court has continually reaffirmed that in such cases implicating the free exercise of First Amendment rights, "the standard of review is determined by the nature of the right assertedly threatened or violated

rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

It is thus irrelevant that Indiana's announced purpose behind the RICO Act is to combat "racketeering." Where the statute is predicated solely upon *allegedly* unprotected speech, prescribes extraordinarily severe penalties for expressive conduct, and thus operates to curtail presumptively *protected* speech by its chilling effect, the First Amendment unquestionably applies as in the case of any other anti-obscenity or anti-defamation statute. In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), Chief Justice Burger noted that "where it was conduct with a significant expressive element that drew the legal remedy in the first place," the usual First Amendment scrutiny would apply. Resorting to "mere labels" such as "nuisance" or "racketeering" cannot confer "talismanic immunity" from the requirements of the First Amendment. *New York Times v. Sullivan*, 376 U.S. 254, 269, (1964).

This Court disposed of the argument the state advances in *Near v. Minnesota*, 283 U.S. 697 (1931), finding the label of "nuisance abatement" inadequate to justify censorship of a newspaper as a sanction for unprotected, defamatory speech. Likewise, characterizing a bookstore or theater as a "racketeering enterprise" exclusively because of two or more obscenity violations does not alter the constitutional ground rules which have always governed obscenity litigation.

This Court must not accept without critical analysis the state's characterization of the RICO Act as a content-

neutral campaign against "racketeering," but rather must subject the statute to searching and realistic scrutiny.

In complete disregard of these principles of First Amendment review, Indiana seeks to invoke the usual presumption that the law is constitutional. Because of the elevated rank of First Amendment rights in our hierarchy of constitutional values, however, a statute which so evidently threatens to chill vast amounts of protected expression does not enjoy the normal presumption of constitutionality. "Where a law is subject to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges does not have the same controlling force." *City of Los Angeles v. Preferred Communications*. 474 U.S. 1099, (1986).

The courts which have reviewed RICO/obscenity provisions under the appropriate First Amendment standards have declared them unconstitutional: e.g. *Goldsmith v. 4447 Corporation*, 479 N.E.2d 578 (Ind. Ct. App. 1985). Only by artificially and erroneously denying that the First Amendment applies at all to such drastic anti-obscenity legislation have the courts in *4447 Corporation, supra*, 504 N.E.2d 599 (Ind. 1987) and *United States v. Pryba*, 674 F. Supp. 1504 (E.D.Va 1987) upheld RICO/obscenity provisions. This Court is respectfully urged to avoid this patent error.

THE SEVERE PENALTIES OF THE RICO/OBSCENITY ACT CREATE AN IMPERMISSIBLE CHILLING EFFECT WHICH RENDERS THE STATUTE INVALID UNDER THE FIRST AMENDMENT.

This Court has continually recognized that because First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society," they "need breathing space to survive." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). The very "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," *id.*, creating "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within [their] purview." *Thornhill v. Alabama*, 310 U.S. 88, 98, 60 S. Ct. 736, 742 (1940). *See also Hustler Magazine V. Falwell*, ___ U.S. ___, 108 S.Ct. 876, 880 (1988).

Integral to the Supreme Court's holding in *Roth v. United States*, 354 U.S. 476 (1957) that obscenity could be regulated as unprotected speech was the stipulation that such statutes must not infringe upon the untrammeled circulation of *protected* materials:

> [S]ex and obscenity are not synonymous . . . .The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

354 U.S. at 487.

As the Court recognized in *Roth, supra*, many Americans value sexually oriented materials as entertainment or as sources of information and, unless such materials

are obscene, they enjoy the full protection of the First Amendment. Because protected expression must not get caught up in the nets designed to snare obscenity, the power to regulate in this area must be strictly limited: "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary." *Id.* at 488.

The RICO/obscenity statute, because of its undue chilling effect, represents an inappropriate and unwarranted incursion through that door.[2] The RICO Act's dramatic breadth and its enhanced criminal penalties for obscenity offenses, when combined with the inherent vagueness of the obscenity definition and the closely related problem of scienter, can only serve to create an unprecedented regime of self-censorship. By making the dissemination of *any* sexually explicit materials an ultra-hazardous endeavor, the RICO statute casts a chilling pall guaranteed to compel First Amendment businesses such as bookstores, theaters, and video outlets to "steer far wider of the unlawful zone," a result the Court long ago condemned in *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

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[2] The United States, as amicus curiae, claims that the "chilling effect" argument was not addressed to the trial court. This claim is incorrect. The statute was challenged on the grounds that it violated the First Amendment (J.A. p. 150, paragraph 1). In the memorandum in support of his Motion to Dismiss, Sappenfield said: ". . . because the defendant has not been convicted of distribution of obscene matter, he submits that he cannot be constitutionally charged with racketeering. To allow this prosecution to continue will have a substantial 'chilling effect' upon the exercise of First Amendment rights." (J.A. p. 156).

The vagueness problem, which indisputably continues to plague obscenity litigation, is discussed in detail in Sappenfield's brief. With the advent of the "video revolution," X-rated videotapes of the type formerly regarded as "hard-core" have become standard viewing fare among American adults. Community standards, which have always been subject to criticism as vague and unascertainable, *Smith v. United States*, 431 U.S. 291 (1977), have become even less ascertainable. Given this situation in which the *Miller* guidelines have become increasingly amorphous, obscenity statutes not only fail to give the fair notice due process requires; they equally fail "to establish minimal guidelines to govern law enforcement," which this Court condemned strongly in *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Regardless of whether one concludes that the vagueness of the *Miller* definition reaches an intolerable level, a defendant charged with an obscenity offense almost never has advance knowledge that the material is obscene and therefore illegal. It is extremely difficult, if not impossible, to predict what materials will be targeted for obscenity prosecution and subsequently adjudged to be obscene. Literary classics and major motion pictures have been subjected to obscenity prosecution "Carnal Knowledge" was deemed obscene at trial and by the Georgia Supreme Court until this Court reversed the decision in *Jenkins v. Georgia*, 418 U.S. 153 (1974). Household name magazines such as *Playboy* and *Penthouse*. available at most newsstands and convenience stores, are frequently threatened with obscenity prosecution. *See, e.g., Council for Periodical Distributors Association v. Evans,*

642 F.Supp. 552 (M.D. Ala. 1986). Such prosecutions abound in Indiana.

In Crawfordsville, Indiana, obscenity prosecutions have recently been lodged against David and Betty Pressler, owners of the Superette Convenience Store, for selling *Swank* magazine and "Erotic X-Film Guide Special," relatively tame sexual fare. (Appendix B). A similar prosecution has been lodged against Ken Heller, the owner of Bank Cigar Store, for selling an issue of the men's magazine, *"The Best of Club."* (Appendix C).

Presumably, the Presslers, Superette Convenience Store, Ken Heller, and Bank Cigar Store could be threatened with a RICO prosecution. Neither they, nor the distributors of the challenged magazines can afford to take such a risk and would be deterred from doing so. Deterrence in this context is the unconstitutional chilling effect which will drive all sexual material from the shelves.

In addition to vagueness, the closely related issue of scienter also factors into the calculus of chilling effect. Immediately following its decision in *Roth* that obscenity could be criminalized as unprotected speech, the Court in *Smith v. California*, 361 U.S. 147 (1959), confronted the issue of strict liability imposed upon a bookseller for possession of obscene material. The Court concluded this type of regulation would "work a substantial restriction on the freedom of speech and of the press" by its chilling effect. *Smith*, 361 U.S. at 150.

Like the ordinance struck down in *Smith, supra*, RICO statutes, authorizing substantial imprisonment for merely making two sales or exhibitions of materials ultimately

found to be unprotected with no requirement of advance knowledge of obscenity, make First Amendment businesses "the strictest censors of their merchandise," and have "such a tendency to inhibit constitutionally protected expression that [they] cannot stand under the Constitution." *Id.* at 152, 155.

Although this Court noted in *Mishkin v. New York*. 383 U.S. 502, 511 (1966), that "the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity," the scienter requirement has been reduced to the vanishing point in practical application. *See Sherwin v. United States*, 572 F.2d 196, *cert. denied*, 437 U.S. 909 (1978) ("constructive knowledge" of material's contents sufficient scienter for obscenity conviction.) In the case of the distributor who desires to market a wide range of materials, the very low threshold of scienter *actually* required in obscenity prosecutions only exacerbates the "inherent ambiguities" of the obscenity definition and increases the peril for disseminating erotic materials. Unable to make a safe judgment that much popular erotic material would be immune from prosecution, the distributor or video store operator has little choice but to engage in self-censorship of precisely the sort this Court sought to preclude in *Smith v. California, supra*.

Indiana claims that the reach of RICO/obscenity is no greater than the reach of obscenity statutes. This is clearly incorrect. The experience of Burke Mendenhall, as expressed in his amicus brief in support of certiorari in *Ft. Wayne Books v. Indiana* (the companion case to this one), demonstrates the inaccuracy of this claim. Burke Mendenhall, a building owner with no interest

in a bookstore save collecting rent, was sued because of his "knowledge" of and "association" with a "racketeering enterprise", that is, a bookstore tenant which had not even opened for business. (J.A. p. 103). Despite the closure of the challenged bookstore, Mendenhall's building is padlocked against all future tenants and the State and respondent Goldsmith continue to seek forfeiture. If Mendenhall is "associated" with the "enterprise" for civil RICO purposes, he is "associated" for criminal RICO purposes. The clear effect of RICO/obscenity is to directly threaten both the bookseller and those who would lawfully aid the seller. Given the experience of Mendenhall, what responsible building owner can safely rent to a store openly selling *any* erotic material? The risk is simply too great![3]

Even assuming these vaguenesses, scienter and overbreadth problems do not create an unconstitutionally chilling effect in the context of garden variety misdemeanor obscenity prosecutions, the additional factor of criminal penalties including a major prison sentence for a RICO/obscenity violation certainly exceeds First Amendment limitations in its deterrence of protected expression.

In *New York v. Ferber*, 458 U.S. 747, 773 (1982) this Court recognized that a penalty imposed by a statute affecting speech may be relevant to a determination of the statute's constitutionality. The Court of Appeals for

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[3] Mendenhall was not the only landlord sued. The action was commenced against Ivan Chalfie and Henry Kahn, d/b/a Disk Development. The complaint alleges that these defendants were "associated" with the enterprise and participated "indirectly" through a pattern of "racketeering activity."

the 9th Circuit in *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir. 1987). has acknowledged that severe criminal penalties for RICO/obscenity might impermissibly chill First Amendment Rights. Although a limiting construction regarding Arizona's felony fine provisions made it unnecessary for the court in *Polykoff* to decide how high the fines would have to be to create a cognizable "chill," certainly a substantial prison term is a greater penalty than *any* fine.

As a practical matter, a statute compelling booksellers, their landlords, and others to guarantee the non-obscenity of all their wares, on pain of prison sentences and fines reserved for robbers, thieves, and kidnappers in Indiana[4] has an undoubted chilling effect. The resulting sentences coupled with forfeiture create a "pall of fear and timidity . . . in an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

Faced with the prospect of long-term imprisonment in addition to other RICO/obscenity sanctions, the failure to discern accurately "the dim and uncertain line" separating protected expression from obscenity, *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963), is fraught with extreme peril. Unavoidably, many booksellers, theaters, and video

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[4] The following crimes are class "C" felonies in Indiana and carry the same penalties as obscenity/RICO without the forfeiture sanctions: Arson (Ind. Code § 35-43-1-1); Assisting a Criminal (Ind. Code § 35-44-3-2); Confinement (Ind. Code § 35-42-3-3); Possession of Narcotics (Ind. Code § 35-48-4-6); Fraud on a Financial Institution (Ind. Code § 35-43-5-8); Robbery (Ind. Code § 35-42-5-1); Inflicting Serious Injury with a Deadly Weapon (Ind. Code § 35-42-2-2); and Theft of Over $100,000 (Ind. Code § 35-43-40-2).

store operators will decide to exclude from their wares most, if not all, sexually oriented materials, the protected along with the unprotected, for fear of erring in the extremely difficult judgment as to whether any given item might now or at some later time be prosecuted as obscene.

Indiana claims that:

> There is no showing . . . that a bookstore or chain of stores would be seized for selling *Penthouse* or even such sexually explicit material as Anais Nin's frankly acknowledged erotic writings titled *Delta of Venus*. Indeed, all these titles have been available to adults in Indiana without suppression by the State.

Respondent's brief p. 11.

Sappenfield submits that after the common enforcement of these statutes, these materials will not continue to be available in Indiana. The present prosecutions in Crawfordsville, Indiana demonstrate the serious mischief a single prosecutor can work. (Appendix B,C,D).

These prosecutions follow a pattern by which prosecutors bring actions against mainstream items in an effort to "clean up" or shape community standards.

In *Jenkins v. Georgia, supra,* this Court pronounced the motion picture "Carnal Knowledge" non-obscene only after the movie had been found obscene by a jury and the Georgia Supreme Court. Presumably, had the RICO/obscenity law been in effect in Georgia in 1974, the theater where Jenkins worked could have been threatened with forfeiture because the film was undoubtedly shown at least twice. Under these circumstances, only the bravest theater owner would have dared to show "Carnal

Knowledge." Indeed, a theater owner in Indiana, Ohio, or any other state, reading of a threatened prosecution in Georgia, would have been moved to decline to show "Carnal Knowledge."

Similarly, in *Penthouse International Limited v. McAuliffe,* 610 F.2d 1353 (5th Cir. 1980), the court of appeals found an issue of *Penthouse* magazine to be obscene. There have been other prosecutions of *Penthouse, e.g., State v. Walden Book Company,* 386 So.2d 342 (La. 1980). *See also Council for Periodical Distributors v. Evans, supra.*

In short, history assures us that prosecutors will seek to prosecute such items as *Penthouse* and *Playboy.* History assures us that an insensitive prosecutor may seek to prosecute *Delta of Venus.* More importantly, a prosecutor can drive *Delta of Venus* from the shelves merely by threatening *Penthouse.* There can be no question that these items are similar and there can be no question that these items may be equally threatened with prosecution. (See Appendix A.) No responsible store owner can risk prosecution when an error in judgment means a death sentence for the business *and* prison for the owner.

Under these circumstances, the local prosecutor would become the *de facto* arbiter of the availability of sexually explicit material in a community. He could, with a letter, drive out sexual material ranging from male sophisticate magazines (for example, *Penthouse* and *Playboy)* to *Delta of Venus* to X-rated videos. (See appendix D).

THE RICO STATUTE, USING OBSCENITY AS A PREDICATE OFFENSE IS NOT A TRADITIONAL USE OF THE STATE'S POWER TO PROSECUTE CRIMINAL ACTIVITY.

Indiana and the United States contend that RICO/obscenity laws are within the state's traditional powers to prosecute obscenity and to deter crime. They further contend that RICO/obscenity laws are necessary to proper law enforcement. Each of these assertions is incorrect.

This Court has repeatedly held that state and federal laws regulating obscenity must be "carefully limited." *Miller v. California*, 413 U.S. 15, 23-24 (1973). *See also Bantam Books v. Sullivan*, 372 U.S. 58 (1963). Respondents and their amici claim that since neither federal nor state RICO statutes have *in other contexts* required prior convictions, no such special safeguards are required in RICO/obscenity enforcement. Yet, RICO prosecutions based upon other predicates do not have the significant impact upon protected expression as the RICO/obscenity statutes. However RICO has been applied in civil or "traditional" criminal contexts, if it is to be applied in the context of obscenity, it must be governed by specific rules which insure the necessary sensitivity.

Indiana claims that obscenity regulation, including RICO/obscenity, is limited only by the use of the correct standard for determination of obscenity. This is incorrect. The Court has repeatedly held, in various contexts, that the procedures which are used to regulate obscenity are constitutionally mandated to insure "the necessary sensitivity to freedom of expression . . ." *Freedman v. Maryland*, 380 U.S. 51 at 59 (1965). *See also A Quantity of Books v.*

Kansas, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). In each of these cases the Court has recognized procedural safeguards unique to obscenity prosecutions. The safeguards are required to ensure, as much as possible, that protected material will not be suppressed. Assuming that the RICO/obsenity statute is neither unacceptably vague nor overbroad, specific procedural safeguards such as those suggested by Sappenfield are necessary to avoid driving protected materials from the marketplace. The many subtle factors which establish "contemporary community standards" and the nuances in material which might make one work protected and another obscene require that a RICO prosecution not be allowed until the seller has demonstrated an unwillingness to comply with the law over a sustained period of time. To allow RICO/obscenity prosecutions based upon isolated errors in judgment is to require that distributors of explicit material *guarantee* that the material is not obscene. Such a requirement would strip society of its vitality and diversity by insuring that only the most sanitized material dealing with sex could be distributed. To require, *de facto*, such sexual pablum is to constrict the First Amendment in a manner which this Court has never before considered, much less allowed.

The RICO/obscenity combination is simply not such a "sensitive tool" that it falls within the state's traditional power to regulate obscenity. Moreover, the massive deterrence which respondents and amici claim is a RICO/obscenity strength is, in fact, the substantial chilling effect which Sappenfield have demonstrated inevitably

results from the statute's application. To call the wholesale removal of an entire class of protected materials "deterrence" is to misunderstand the fundamental protection which the First Amendment has traditionally conferred upon speech of all kinds. To call the chilling effect of the RICO/obscenity statute "deterrence" is to redefine the "sensitive tools" which this Court has traditionally required in statutes regulating speech.

Finally, respondents assert that there is a legitimate state interest which requires use of RICO/obscenity against individuals such as Sappenfield. Indiana characterizes this interest in terms of *Russello v. United States*, 464 U.S. 16 (1983), that is, new weapons against organized crime.

Implicit in this analysis is the proposition that present obscenity laws cannot or do not reach Sappenfield's conduct. There is no basis for Indiana to conclude that, if convicted of the underlying obscenity charges, Sappenfield will not attempt to bring materials offered for sale in line with the contemporary community standards of Howard County. Sappenfield has not demonstrated an unwillingness to comply with the law. Yet, by artificially renaming his obscenity charges racketeering, the state "ups the ante" so that Sappenfield faces twenty years of imprisonment and business extinction.

The host of other crimes allegedly committed by some *producers* of explicit material – prostitution, kidnapping, drug use, child pornography, rape, and indeed, murder – are all punishable by criminal statutes including RICO using offenses other than obscenity as predicates. That these offenses may have occurred in isolated instances in the past at the production level does not

justify using this statute against the ultimate seller of erotic materials. In short, Indiana, by calling anti-obscenity legislation "racketeering" and listing numerous accusations, many of which are unproven, hope to blind the Court to the profound impact of RICO/obscenity upon protected speech.

Indiana simply does not recognize that the First Amendment's protection makes the sale of a magazine, a book, or a movie different from the sale of narcotics. When one sells cocaine, he knows he is committing a crime. When one sells a book, magazine, or movie, he is acting lawfully. The act becomes unlawful only if, and when, a jury rules the work obscene. This difference, resulting from the protection of the First Amendment, creates a distinction separating obscenity offenses from all other crimes.

CONCLUSION

It is ironic that at a time when sexually explicit materials, especially video tapes, are enjoying unprecedented popularity, a highly politicized campaign exists to drive all such materials from the marketplace.[5] RICO/

[5] In conjunction with the activities of the Attorney General's Commission on Pornography, a letter was sent to various chains of stores threatening to label them "pornographers" because they offered for sale certain male sophisticate magazines. The publishers were forced to seek injunctive relief to prevent political pressure from driving them from retail outlets. *Playboy Enterprises Inc. v. Edwin Meese III, Attorney General*, 639 F.Supp. 581 (U.S.D.C. Dist. Col. 1986). As the letter contained in appendix 4 demonstrates, such pressure is not confined to the Attorney General of the United States.

obscenity statutes, with harsh prison sentences, potentially huge fines, and forfeiture will have that effect. No responsible businessman can be aware of the sentence and forfeitures imposed in *United States v. Pryba, supra*[6] or of what happened to Burke Mendenhall and risk selling erotic material. No responsible book or video store nor its landlord can risk offending the local prosecutor when, with but a few hours' work, the prosecutor can close the store and seize the building which houses it. The impact of RICO/obscenity is not merely "deterrence;" it is the creation of a group of supercensors – not courts, not jurys, not the market – but rather, the various county, state, and federal prosecutors who can control what material is available with a letter. Sappenfield urges the Court not to allow such a class of supercensors to emerge but rather to strike down the RICO/obscenity statute.

Respectfully submitted,

RICHARD KAMMEN
McCLURE, McCLURE & KAMMEN
235 North Delaware
Indianapolis, Indiana 46204
Telephone: (317) 632-6341

Counsel for Petitioner

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[6] The order of forfeiture in *Pryba*, (Appendix B, Brief of Ft. Wayne Books) forfeited property having a value of hundreds of thousands of dollars based upon the sale of less than $200.00 of sexually explicit material. Certain individual defendants received executed prison sentences.

APPENDIX A

Skinny-Dipping Campers Take Plunge in Hot Gals' Love Canals

Excerpted from *Letters, Crowd Scenes, Penthouse Letters,* June 1988, Vol. 6, No. 6, p. 9, ©1988 by Penthouse Letters Ltd.

I have been an avid fan of *Penthouse Letters* for many years, and I have always envied the experiences that I have read about. Finally, however, I had an experience worth writing about.

I recently went camping for a weekend with two friends, Roger and David, at Fall Creek Falls State Park here in central Tennessee, a few hours from Nashville. We spent Saturday morning hiking around on the day trails and soon found them too crowded for our liking. So we decided to strike out on our own. We left the crowds gathered at the base of the falls and followed the creek downstream over rugged rocks for quite a ways. The rough going had us hot and sweaty, and we soon reached a spot that we thought would be isolated enough to strip naked and go for a swim.

The water was extremely refreshing, and in fact was so cold that it shrank our vital parts! We frolicked for a while, feeling primitive and natural, when we heard noises coming from the woods along the shore. I looked up to see three lovely young ladies tromping along in full backpacking gear. Needless to say, we were more than a bit embarrassed, and I rather expected them to be frightened and leave. Much to my surprise, however, the one in the lead flashed us a big smile and said, "Hi!" I managed to mumble something in response, and another of the girls said, "Mind if we join you?" We all grew excited at

the thought of seeing those supple forms naked and splashing in the water. I watched admiringly as they slipped off their packs and got out of their clothes. They plunged into the chilly river, the cold making their nipples stand up and salute.

After a bit of good natured romping together, the cold of the water got to be too much, and I climbed up on a rock with Melanie, the one who had spoken first, to catch some sun and warm up. No sooner were we there than she took a look at my shriveled schlong and said, "Aw, did the cold water shrink your pecker? I'll bet I can make it get big." With that she took my withered organ into her mouth and within moments had it standing proud at its full nine inches. From somewhere behind me, I heard one of the other girls tell Dave, "I want to suck your big fat cock," and out in the middle of the river Roger had found a warm place to put his pulsating manhood. Melanie's long brown hair tickled my stomach as her head bobbed up and down on my engorged member. I reached out to fondle her gorgeous breasts. From behind I heard Kim moaning, and twisted around enough to see her engaged in a furious 69 with David.

Melanie's skillful sucking had brought me to the brink of an explosive orgasm, and she, sensing this, stopped and squeezed the tip, saying, "Got to save something for me!" Out in the shallow water Roger and Jan were going at it so hard I thought their splashing would empty the river. I turned Melanie around and began licking her quivering quim, and soon I had her shuddering in a violent orgasm. She then rolled over and said, "Your prick is so beautiful. Fill me up with your fat cock." She mounted me and began rocking up and down,

back and forth. Soon I couldn't hold off any longer. I thought my whole body would explode as I shot my wad in her wet cunt.

Exhausted, we turned around to catch the show behind us. We were just in time to see Dave shoot a hot load of come into Kim's mouth. She smiled sweetly as she swallowed, licking her chin to catch a dribble and then going back down on him to finish off every last bit. "Mmm, that's good," she said as he gently stroked her voluptuous tits. She began to fondle his peter and soon had him hard again, whereupon he mounted her and began pumping. By this time Jan had had enough of the cold water, and Melanie was so hot from our session that she wanted to cool off again; so Roger and I traded partners. Jan's wet, sensuous body glistened in the sun as she approached me, smiling. "He's a tough act to follow, but you look to me like you can measure up, she said as she began stroking my flaccid penis.

We fucked for what seemed like hours, during which Jan must have climaxed a dozen times, and finally I came even more earthshakingly than before. David and Kim had rejoined Roger and Melanie in the water, and after catching our breath, Jan and I did so as well. We were soon cooled off. We got out of the water, dried off and got dressed. We invited the girls to come by our campsite later on for some wine, and they said they might drop in. After good-bye kisses all around, they were off into the woods again. We never saw them again, but they gave us something we will remember the rest of our lives!--*F.W., Nashville, Tenn.*

The Boarding School

By Anais Nin

Excerpted from *The Delta of Venus: Erotica* by Anais Nin, ©1969 by Anais Nin, ©1977 by The Anais Nin Trust, 1986 Harvest/Harcourt Brace Jovanovich.

This is a story of life in Brazil many years ago, far from the city, where the customs of strict Catholicism still prevailed. Boys of good birth were sent to boarding schools run by the Jesuits, who continued the severe habits of the Middle Ages. The boys slept on beds of wood, rose at dawn, attended mass without breakfast, confessed every day and were constantly watched and spied upon. The atmosphere was austere and inhibiting. The priests ate their meals apart and created an aura of sainthood around themselves. They were stylized in their gestures and speech.

Among them was a very dark-skinned Jesuit who had some Indian blood, the face of a satyr, large ears glued to his head, piercing eyes, a loose-lipped mouth that was always watering, thick hair and the smell of an animal. Under his long brown robe the boys had often noticed a bulge which the younger boys could not explain and which older boys laughed at behind his back. This bulge would appear unexpectedly at any hour–while the class read *Don Quixote* or Rabelais, or sometimes while he merely watched the boys, and one boy in particular, the only fair-haired one in all the school, with the eyes and skin of a girl.

He liked to get this boy off by himself and show him books from his private collection. These contained reproductions of Inca pottery on which there were often depictions of men standing against each other. The boy would ask questions which the old priest had to answer elusively. Other times the prints were quite clear; a long member came out of the middle of one man and penetrated the other from behind.

At confession this priest plied the boys with questions. The more innocent they appeared to be, the closer he questioned them in the darkness of the little confessional box. The kneeling boys were unable to see the priest, who was sitting inside. His low voice came through a small grilled window, asking, "Have you ever had sensual fantasies? Have you thought about women? Have you tried to imagine a woman naked? How do you behave at night in bed? Have you ever touched yourself? Have you ever fondled yourself? What do you do in the morning upon rising? Do you have an erection? Have you ever tried to look at other boys while they dress? Or at the bath?"

The boy who did not know anything would soon learn what was expected of him and be tutored by these questions. The boy who knew took pleasure in confessing in detail his emotions and dreams. One boy dreamed every night. He did not know what a woman looked like, how she was made. But he had seen the Indians making love to the vicuña, which resembled a delicate deer. And he dreamed about making love to vicuñas and awakened all wet every morning. The old priest encouraged these confessions. He listened with endless patience. He imposed strange punishments. A boy who masturbated

continuously was ordered to go into the Chapel with him when no one was around, dip his penis in the holy water, and thus be purified. This ceremony was carried out in great secrecy at night.

There was one very wild boy who looked like a little Moorish prince, black-faced, with noble features, a royal carriage, and a beautiful body so smooth that no bones ever showed, lean and polished as a statue. This boy rebelled against the customary wearing of nightgowns. He was used to sleeping naked and the nightgown choked him, stifled him. So every night he put it on like the other boys, and then he would secretly take it off under his covers and finally fall asleep without it.

Every night the old Jesuit would make his rounds, watching that no boy visited another in his bed, or masturbated, or talked in the dark to his neighbor. When he reached the bed of the undisciplined one, he would slowly and cautiously lift the cover and look at his naked body. If the boy awakened he would scold him. "I came to see if you were sleeping without a nightgown again!" But if the boy did not awaken he was content with a long lingering glance at the youthful body asleep.

Once during anatomy class when he stood on the teacher's platform, and the girlish blond boy sat staring at him, the prominence under his priest's robe became obvious to everyone.

He asked the blond boy, "How many bones does man have in his body?"

The blond boy answered meekly, "Two hundred and eight."

Another boy's voice came from the back of the classroom, "But Father Dobo has two hundred and nine!"

It was soon after this incident that the boys were taken on a botanical excursion. Ten of them lost their way. Among them was the delicate blond boy. They found themselves in a forest, far from the teachers and the rest of the school. They sat down to rest and decide upon a course of action. They began eating berries. How it began, no one knew, but after a while the blond boy was thrown on the grass, undressed, turned on his stomach, and the other nine boys all passed over him, taking him as they would a prostitute, brutally. The experienced boys penetrated his anus to satisfy their desire, while the less experienced used friction between the legs of the boy, whose skin was as tender as a woman's. They spat on their hands and rubbed saliva over their penises. The blond boy screamed and kicked and wept, but they all held him and used him until they were satiated.

APPENDIX B

THE STATE OF INDIANA)
) SS:
COUNTY OF MONTGOMERY)

IN THE MONTGOMERY CIRCUIT COURT

1988 TERM

STATE OF INDIANA	INDICTMENT FOR:
VS	DISTRIBUTION OF OBSCENE MATTER
DAVID PRESSLOR BETTY PRESSLOR	I.C. 35-49-3-1(2) Class A Misdemeanor (Filed June 28, 1988)

THE GRAND JURY of the County of Montgomery, State of Indiana, upon their oath or affirmation do present that David Presslor and Betty Presslor on the 9th day of November, 1987, at the County of Montgomery, in the State of Indiana; did offer to distribute, distribute, exhibit to Candy Woodall obscene matter, to-wit: magazines titled; "The Hottest Porn Stars"; "Swank"; "Exotic X-Film Guide Special." All of which is contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

A TRUE BILL

/s/ Thomas F. Brinkfield
Foreman, Grand Jury
/s/ Martin A. Pruitt
/s/ Mary J. Cripe
/s/ Judy A. Goss
/s/ Mariann A. Sarver

/s/ Wayne Steele
Wayne E. Steele
Prosecutor
22nd Judicial Circuit
State of Indiana

Filed and recorded in open Court this 28th day of June, 1988.

/s/ Kim Servies for
Rebecca Neideffer
REBECCA NEIDEFFER
Clerk, Montgomery Circuit Court

APPENDIX C

STATE OF INDIANA)
) SS:
COUNTY OF MONTGOMERY)

IN THE MONTGOMERY CIRCUIT COURT

1988 TEAM

STATE OF INDIANA	INDICTMENT FOR:
VS	DISTRIBUTION OF OBSCENE MATTER
KEN HELLER	I.C. 35-49-3-1(2) Class A Misdemeanor (Filed June 28, 1988)

THE GRAND JURY of the County of Montgomery, State of Indiana, upon their oath or affirmation do present that Ken Heller on the 9th day of November, 1987, at the County of Montgomery, in the State of Indiana; did offer to distribute, distribute, exhibit to Candy Woodall obscene matter, to-wit: a magazine titled; "The Best of Club International". All of which is contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Indiana.

A TRUE BILL

/s/ Thomas F. Brinkfield
Foreman, Grand Jury
/s/ Martin A. Pruitt
/s/ Mary J. Cripe
/s/ Judy A. Goss
/s/ Mariann A. Sarver

/s/ Wayne Steele
WAYNE E. STEELE
Prosecutor
22nd Judicial Circuit
State of Indiana

Filed and recorded in open Court this 28th day of June, 1988.

/s/ Kim Servies for
Rebecca Neideffer
REBECCA NEIDEFFER
Clerk, Montgomery Circuit Court

APPENDIX D

Office Of
WAYNE E. STEELE
PROSECUTING ATTORNEY
(SEAL) 22nd Judicial Circuit
Montgomery County Courthouse
Crawfordsville, Indiana 47933
317-362-3242

June 3, 1987

TO: Bookstore Owners and Manager, Magazine Retail Dealers, Owners and Managers, and Video Rental and Retail Outlet Owners and Managers.

FROM: Wayne E. Steele, Prosecuting Attorney, Montgomery County, Indiana

To Whom It may Concern:

As you may know from press releases and radio newscasts, the Montgomery County Prosecutor's Task Force on Obscenity has jus completed its study of obscenity, and, more particularly, the availability of obscene materials in Montgomery County, Indiana. One of the surprising elements of the report of this task force was the information they provided this office regarding the amount of matter available in Montgomery County, which by statutory definition, and the standards considered by the task force, would be considered obscene. Such information, of course, is of deep concern to this office.

I am attaching for your information copies of the pertinent statutes under which prosecution for the distribution of obscene materials would be undertaken. I would like to call your attention to the provisions of I.C.

35-49-2-1. In judging matter that would be subject to prosecution under this chapter, considerable weight is to be given to the nature of contemporary community standards. I have been persuaded by the Task Force's Report that the community standards' test would apply, at least, to the following. (1) Matter which depicts, portrays, illustrates, or describes sexual conduct as defined under I.C. 35-49-1-9 and is offered for sale or rental, would be in violation of contemporary community standards in Montgomery County, Indiana. (2) Matter - for sale or rental - which depicts, portrays, describes or illustrates sadomasochistic abuse as defined under I.C. 35-49-1-8 would be in violation of contemporary community standards in Montgomery County, Indiana. (3) Matter which depicts, describes, or illustrates sexual excitement as defined under I.C. 35-49-1-10, and which is offered for sale or rental, would be in violation of contemporary community standards in Montgomery County, Indiana. (4) Ay matter which singly or collectively appeals to prurient interest in sex and which is touched upon by the prohibitions of these and other statutes would be in violation of contemporary community standards in Montgomery County, Indiana.

For your futher information, I would call you attention to I.C. 35-49-2-1, and point out that matter which has as its dominant theme an appeal to the prurient interest in sex, or which portrays, depicts, illustrates, or describes in a patently offensive manner sexual conduct, and which lacks serious literary, artistic, political, or scientific value would be a legitimate basis for prosecutorial action.

In addition, I want to call your attention to the provisions of I.C. 35-49-3-3 which provide for independent prosecutorial action for displaying such matter as discussed in this letter or indicated in the attached statutes, in a manner that makes them accessible to minors.

In regard to this I call your attention further to the provisions of I.C. 35-49-2-2 which provides for an independent standard of judgment and proof to be applied when dealing with matter made accessible to minors for the purpose of viewing, browsing, purchasing or renting.

Now that I have the Task Force's report to assist me in gauging community standards, and because I am obliged to enforce the statutes of the State of Indiana, I feel that merchants should be given the opportunity to consider these findings and the actions which the statutes compel. I hope that this letter will assist you in understanding the basis for future action that may be taken by the Prosecutor's Office.

If you have any questions on these matters, please do not hesitate to contact my office.

Sincerely yours,

/s/ Wayne Steele
Wayne E. Steele
Prosecuting Attorney
Montgomery County, Indiana

WES/sm